

**IN THE COURT OF APPEALS**  
**FIRST APPELLATE DISTRICT OF OHIO**  
**HAMILTON COUNTY, OHIO**

MACY K. SWENSSON,	:	APPEAL NO. C-070695
	:	TRIAL NO. A-0603962
Plaintiff-Appellant,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
JOHN SULLIVAN, M.D.,	:	
and	:	
NORTHEAST CENTER FOR	:	
WOMEN'S HEALTH, INC.,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

In one assignment of error, plaintiff-appellant Macy K. Swensson argues that the trial court improperly instructed the jury that a non-HIPPA compliant release could shield a healthcare provider from liability for the unauthorized disclosure of confidential medical information under a less stringent common-law theory of consent. Since any such error would have been harmless in this case, we affirm.

Macy<sup>2</sup> and her husband, Dan, divorced after 14 years of marriage. During their marriage, Macy's gynecologist was defendant-appellee Dr. John Sullivan. Dr. Sullivan was also a close friend of Dan. After the couple separated, Macy became a patient of Dr. Jon Fackler, Dr. Sullivan's partner at Northeast Center for Women's Health ("NCWH").

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

<sup>2</sup> Because Macy and Dan Swensson have the same last name, we use their first names.

Two years later, Dr. Fackler diagnosed Macy with human papilloma virus (“HPV”). HPV is a form of cervical dysplasia and is a sexually-transmitted disease. Dr. Fackler performed a surgical procedure to treat the dysplasia. After the procedure, Macy learned that her daughter knew about her condition and that she had learned about it from her father, Dan. Macy then learned that Dan and Dr. Sullivan had had a conversation about the condition.

Macy filed suit against Dr. Sullivan and NCWH, claiming tortious breach of confidentiality, professional negligence, invasion of privacy, and intentional infliction of emotional distress. The case proceeded to a jury trial, and the jury found in favor of Dr. Sullivan and NCWH. When deciding the breach-of-confidentiality claim, the jury answered the following interrogatory in the negative: “Do you find by the greater weight of the evidence that Dr. John Sullivan learned nonpublic medical information about Macy Swensson in a confidential relationship?”

On appeal, Macy argues that the trial court improperly instructed the jury on the requirements of the Health Insurance Portability and Accountability Act (“HIPAA”) by instructing the jury that a disclosure could be made pursuant to the patient’s “consent” rather than through HIPAA compliance. But even if a trial court erroneously instructs the jury with respect to an issue, the error is rendered harmless if the jury’s response to interrogatories shows that it was not necessary to reach a decision related to the erroneous instruction.<sup>3</sup>

In 1999, the Ohio Supreme Court recognized a cause of action for “the unauthorized, unprivileged disclosure to a third party of nonpublic medical information *that a physician or hospital has learned within a physician-patient relationship.*”<sup>4</sup> At

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<sup>3</sup> *Brophey v. Admr., Bureau of Workers' Comp.*, 7th Dist. No. 07MA24, 2008-Ohio-646, at ¶13, citing *Schmidt v. Koval*, 7th Dist. No. 00CA239, 2002-Ohio-1558, at ¶48.

<sup>4</sup> *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 401, 1999-Ohio-115, 715 N.E.2d 518 (emphasis added).

trial, both Dan and Dr. Sullivan testified about their conversation. Macy testified that she had told Dan that she had cervical dysplasia. Dan testified that he had then researched the condition on the Internet and discovered its relationship to HPV. According to the testimony, he then contacted Dr. Sullivan to ask him general questions about cervical dysplasia. Dr. Sullivan testified that he did not make the connection to Macy, since she and Dan had been divorced for two years, and that he assumed that the questions related to Dan's girlfriend. Dan then told Dr. Sullivan that the questions related to Macy.

As evidenced by its interrogatory answer, the jury found that Dr. Sullivan had not learned about Macy's condition as a result of a confidential, physician-patient relationship. Under these circumstances, the issue of whether any disclosure was authorized—or the manner in which such authorization had to occur—never became relevant. Any impropriety in the jury instruction on that issue was harmless error.

Macy's sole assignment of error is overruled, and the trial court's judgment is affirmed.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**SUNDERMANN, P.J., HENDON and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on September 3, 2008  
per order of the Court \_\_\_\_\_.  
Presiding Judge